UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IN RE:	***)***	
	)	
DISPOSABLE CONTACT LENS	***)***	***Misc. No. 98-100-P-DMC***
ANTITRUST LITIGATION	***)***	

MEMORANDUM DECISION ON DEFENDANT JOHNSON & JOHNSON VISION PRODUCTS' MOTION TO TRANSFER MOTION OF MAINE BOARD OF OPTOMETRY TO QUASH SUBPOENA

The State of Maine is a plaintiff in a multidistrict antitrust action pending in the United States District Court in the Middle District of Florida, *In re: Disposable Contact Lens Antitrust Litigation*, Civil Action No. MDL 1030, in which Johnson & Johnson Vision Products, Inc. d/b/a Vistakon ("Vistakon") is a defendant. On or about November 9, 1998 Vistakon served a subpoena, issued by this court, upon the Maine Board of Optometry ("Board") for a deposition to be taken on December 2, 1998 and production of certain specified documents, in connection with the multidistrict litigation. Subpoena, Exh. A to Motion to Quash (Docket No. 1). On November 25, 1998 the Board filed in this court a motion to quash the subpoena as to the deposition. Docket No. 1.

On November 30 and December 1, 1998 I held telephone conferences with counsel for Vistakon and the Board to discuss issues relating to the motion to quash. During the conferences I raised as an issue this court's authority to transfer this dispute for resolution to the district court in which the multidistrict action is pending in light of the multidistrict aspect of the underlying litigation and the

potential for inconsistent decisionmaking on likely recurring issues.[1] Vistakon agreed to file a response to the motion to quash addressing these issues as well as the merits of the motion by the close of business December 3, 1998 and the Board agreed to file its reply by the close of business on December 10, 1998. Report of Conferences of Counsel and Order (Docket No. 2). Having been informed by counsel of the limited time remaining in the multidistrict action for discovery, I in turn agreed to rule on the motion as soon as possible thereafter.

On December 3, 1998 Vistakon filed its Response to the Maine Board of Optometry's Motion to Quash Subpoena (Docket No. 3) and a Motion to Transfer the Maine Board of Optometry's Motion to Quash Subpoena (Docket No. 4), enclosing an order of the United States District Court for the Southern District of Florida transferring the motion to quash a subpoena issued in connection with the multidistrict action and served upon a non-party to the Middle District of Florida for resolution. Order Transferring Action to the United States District Court for the Middle District of Florida (July 21, 1995), *In re: Disposable Contact Lens Antitrust Litigation*, Case No. 94-7231-CIV-Zloch, United States District Court, Southern District of Florida, Exh. A to Motion to Transfer. On December 10, 1998 the Board filed its Objection to Motion to Transfer and Reply to Objection to Motion to Quash ("Objection") (Docket No. 5). The matter is now ready for decision. I grant the motion to transfer.

The statute governing multidistrict litigation provides, in pertinent part:

> Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. . . . The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may

[1] Maine is one of thirty one plaintiff states in this antitrust suit against Vistakon and several other defendants. During the November 30, 1998 conference, counsel for Vistakon represented that Vistakon has served subpoenas similar to that at issue here on several comparable boards operating in the plaintiff states.

> exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

28 U.S.C. § 1407(b). A deposition is the subject of the motion to quash at issue here. Accordingly, the judge presiding over the multidistrict action in the Middle District of Florida may exercise the powers of a judge in this district with respect to that deposition. *In re Matter of Orthopedic Bone Screw Prods. Liab. Litig*., 79 F.3d 46, 48 (7th Cir. 1996); *In re Factor VIII or IX Concentrate Blood Prods. Litig*., 174 F.R.D. 412, 415 (N.D.Ill. 1997).

It is this statute and the fact that the State of Maine is a party to the multidistrict action that distinguish the instant case from *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), upon which the Board relies in its opposition. In that case, the District of Columbia Circuit reversed the trial court's granting of a motion to transfer a nonparty's motion to quash a subpoena to the Eastern District of Arkansas, where the underlying action was pending. *Id*. at 339. The underlying action was not multidistrict litigation, and the District of Columbia Circuit concluded that the trial court lacked the "inherent powers to transfer," because the transferee court would lack the power under the Rules of Civil Procedure to act on a subpoena issued by a different court. *Id*. at 341-43. Other circuits have disagreed, in opinions which I find more persuasive, but the point to be made here is that the transferee court in this case would have that power by virtue of 28 U.S.C. § 1407(b).[2] The District of Columbia Circuit also expressed concern that the transferee court would lack personal jurisdiction over the nonparty seeking to quash the subpoena. *Id*. at 341, 343 (Henderson, J., concurring). Here, the Board

[2] It is for this reason that the only other authority cited by the Board in support of its opposition, *Productos Mistolin, S.A. v. Mosquera*, 141 F.R.D. 226 (D.P.R. 1992), is also distinguishable. That opinion deals only with the power of a court, not the forum court in an action other than multidistrict litigation, to compel compliance with a subpoena, void on its face, that had been issued by the forum court and served on a party outside the forum district.

is an agency of the State of Maine, which has already submitted itself to the jurisdiction of the Middle District of Florida by filing a complaint in the multidistrict action after it had been assigned to that court. *See University of Rhode Island v. A. W. Chesterton Co.*, 2 F.3d 1200, 1204 (1st Cir. 1993) ("most unincorporated state agencies and departments are readily recognizable as mere 'arms' or 'alter egos' of the State" for purposes of diversity jurisdiction).

Courts that have rejected requests to transfer motions to quash to the court in which the underlying action is pending have generally done so when the nonparty moving to quash refuses to consent to the transfer, on the grounds that only by the consent of the nonparty can the tranferee court have personal jurisdiction over the nonparty. *E.g., Byrnes v. Jetnet Corp*., 111 F.R.D. 68, 70 & n.2 (M.D.N.C. 1986). Even if that were a valid consideration in this case, however, I am persuaded that the analysis of courts that have not imposed this limitation is the better-reasoned approach. *E.g., In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8th Cir. 1991); *Petersen v. Douglas County Bank & Trust Co.*, 940 F.2d 1389, 1391 (10th Cir. 1991); *In re Subpoena Duces Tecum to: Schneider Nat'l Bulk Carriers, Inc.* 918 F. Supp. 272, 273 (E.D.Wis. 1996); *Socialist Workers Party v. Attorney General*, 73 F.R.D. 699 (D. Md. 1977).

Given the scope of the multidistrict action and the need to coordinate far-flung discovery in an efficient and timely manner, transfer of this matter seems particularly appropriate.[3] As the Seventh Circuit observed in *In re Orthopedic Bone*,

> A principal purpose of § 1407 is to allow one judge to take control of

[3] On December 9, 1998 I spoke by telephone with United States Magistrate Judge Howard T. Snyder of the Middle District of Florida in order to determine his willingness to hear and decide the pending matter. Judge Snyder informed me that he is currently handling approximately ten similar discovery disputes in the multidistrict litigation and he is quite willing to resolve the Board's motion expeditiously. Needless to say, I do not share the Board's "doubts about the efficiency of the Middle District of Florida's resolving dozens of these motions." Objection at 3.

> complex proceedings, the better to avoid unnecessary duplication in discovery. [A judge in the transferee district] is much better situated than is [a judge in the district from which the subpoena issued] to know whether the depositions [a party] seek[s] to take, and the questions they propose to ask, are appropriate, cost-justified steps toward resolution of the litigation. [Calling on the transferee court to handle the motion] does not require anyone to travel; lawyers can send the motions to [the transferee court] on paper, and the *Manual for Complex Litigation* suggests that the judge hear arguments by telephone to curtail travel costs.

79 F.3d at 48. The judge in the Middle District of Florida knows the details of any discovery deadlines currently in existence in the multidistrict action and the history of discovery efforts to date. While the objection raised by the Board may well be, as it contends, "uncomplicated," Objection at 3, there is no reason to believe that it cannot be as easily and directly addressed by the court in charge of the underlying litigation as it could be by this court. A decision by the Middle District of Florida will have the substantial additional benefit of consonance with the results of similar discovery disputes arising out of the multidistrict litigation and already transferred to the Middle District of Florida.

For the foregoing reasons, the motion of Johnson & Johnson Vision Products, Inc. to transfer the Motion to Quash filed by the Maine Board of Optometry to the United States District Court for the Middle District of Florida is **GRANTED**. The court accordingly takes no action on the motion to quash.

Dated this 11th day of December, 1998.

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David M. Cohen
United States Magistrate Judge